



**Onyango (Suing as personal representative of Roman Onyango Onyuma) v Onyango & 3 others
(Environment & Land Case 12 of 2018) [2023] KEELC 18933 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 12 OF 2018**

**BN OLAO, J
JULY 20, 2023**

BETWEEN

**ABRAHIM ODHIAMBO ONYANGO (SUING AS PERSONAL
REPRESENTATIVE OF ROMAN ONYANGO ONYUMA) PLAINTIFF**

AND

**JOSEPH OCHIEL ONYANGO 1ST DEFENDANT
PETER LUNANI ONGOMA 2ND DEFENDANT
OWADE CHARLES MUDIMBA 3RD DEFENDANT
DAPHINE NAFULA MISIKA 4TH DEFENDANT**

JUDGMENT

1. It is said that a brother's unconditional love is priceless. There can be no better companion than a brother and no better friend than a sister. Healthy sibling relationships promote empathy and an incredible source of support. On the other hand, unhealthy and toxic sibling relationships can be devastating and destabilizing. The book of Proverbs 17:17 also reminds us that:

"A friend loves at all times, and a brother is born for adversity."
2. Joseph Ochiel Onyango (the 1st Defendant) did not file any his defence or participate in these proceedings. Hopefully, however, his brother Abraham Odhiambo Onyango (the Plaintiff) will share with him a copy of this judgment and draw his attention not only to the final disposal orders but most importantly, the opening paragraph which exhort the virtues of brotherly love.
3. The Plaintiff and 1st Defendant are siblings being the children of one Roman Onyango Anyuma (deceased) who, prior to his demise on June 7, 1997, was the registered proprietor of the land parcel



- No Marachi/Elukongo/2475 which has since been sub-divided to create land parcels No Marachi/Elukongo/3363 and 3364 (the suit land).
4. By his plaint dated February 21, 2018 and which was subsequently amended on November 6, 2020, the Plaintiff sought judgment against the 1st Defendant as well as Peter Lunani Ongoma, Owade Charles Mudimba And Daphine Nafula Misika (the 2nd, 3rd and 4th Defendants respectively) in the following terms:
 - (a) Revocation of all entries made on NO Marachi/Elukongo/2475 as from October 21, 2001 onward and all title deeds emanating from the sub-divisions be quashed.
 - (b) Costs of this suit.
 - (c) Any other alternative relief which this Court may deem fit to grant.
 5. The basis of the Plaintiff's case is that he is the Administrator to the Estate of the deceased. However, the 1st Defendant has fraudulently and without carrying out any succession process, sub-divided the land parcel No Marachi/Elukongo/2475 to create land parcels NO Marachi/Elukongo/3363 and 3364. The land parcel NO Marachi/Elukongo/3363 was later sub-divided to create land parcels NO Marachi/Elukongo/3773 and 3774 which are registered in the name of the 3rd Defendant. Land parcel NO Marachi/Elukongo/3364 is registered in the name of the 2nd Defendant. Land parcel NO Marachi/Elukongo/3773 was later sub-divided to create land parcels NO Marachi/Elukongo/3940 and 3941 which are registered in the name of the 4th Defendant.
 6. The particulars of fraud on the part of the 1st Defendant are pleaded in paragraph 4A of the plaint as follows:
 1. Causing the land parcel No Marachi/Elukongo/2475 to be sub-divided without the Grant of Letters of Administration and the Certificate of Confirmation of the Grant.
 2. Presenting letter of consent dated November 11, 2010 to the Land Registrar pretending to be genuine.
 3. Presenting an application from Butula Land Control Board purporting to have been signed by the proprietor on November 11, 2010 when he had actually died on June 7, 1997.

The Plaintiff adds, therefore, that the original land parcel NO Marachi/Elukongo/2475 did not belong to the Defendant but was supposed to be shared among the deceased's sons namely the Plaintiff, the Defendant and their elder brother Thomas Opondo Onyango. That the title should be cancelled and subjected to the succession process.
 7. In support of his case, the Plaintiff recorded two statements dated February 21, 2018 and an un-dated statement filed on November 6, 2020. His case as can be gleaned from the two statements is that the deceased, prior to his demise on June 7, 1997, was the proprietor of the land parcel No Marachi/Elukongo/2475. He transmitted parcel NO Marachi/Elukongo/2476 to him and parcel NO Marachi/Elukongo/2488 to the 1st Defendant. However, on October 21, 2011, the 1st Defendant purported to sub-divide the land which he then transferred to third parties. That those sub-divisions are un-lawful and should be struck off the register. That the Plaintiff was granted letters of Administration in respect of the deceased's Estate on March 8, 2017.
 8. The Plaintiff filed two lists of documents dated February 21, 2018, October 23, 2018 and another un-dated further list of documents. Those lists contained the following documents which he produced during the trial:



1. Certificate of death of the deceased.
 2. Copy of register for the land parcel No Marachi/Elukongo/2475.
 3. Mutation Form dated November 12, 2010 for the land parcel No Marachi/Elukongo/2475.
 4. Letter of consent.
 5. Application for consent.
 6. Certificate of Official Search for the land parcel No Marachi/Elukongo/2475.
 7. Application for consent to sub-divide land parcel No Marachi/Elukongo/1517.
 8. Mutation Form for the sub-division of the land parcel No Marachi/Elukongo/1517 to create the land parcels No Marachi/Elukongo/2488, 2476 and 2475.
 9. Limited Grant of Letters of Administration issued to the Plaintiff in Busia Cm P&a Cause No 03 of 2017 on March 8, 2017 limited for the purpose of filing this suit.
 10. Certificate of Official Search for the land parcels No Marachi/Elukongo/3363, 3364, 3773, 3774, 3940 and 3941.
9. The 1st Defendant did not file any defence.
 10. The 2nd Defendant filed a defence dated December 16, 2020 in which he pleaded, *inter alia*, that he is a stranger to the Plaintiff's claims and put him to strict proof thereof. He pleaded that the suit is bad in law as he has been improperly joined and in any event, the amended plaint disclosed no cause of action against him as there is no privity of contract between him, the Plaintiff or the 1st Defendant. He therefore sought the dismissal of the suit with costs.
 11. He filed his statement dated March 4, 2021 in which he confirmed that he is the registered proprietor of the land parcel No Marachi/Elukongo/3364 which he purchased on April 23, 2015 from one Douglas Wanafoyo Ogara. That he obtained the requisite consent of the Land Control Board from the Butula Divisional Land Control Board having done due diligence and having confirmed that the said land belonged to the said Douglas Wanafoyo Ogara who, in turn, had purchased it from the deceased. He is therefore bona fide purchaser.
 12. The 2nd Defendant filed the following documents as per the list dated March 4, 2021:
 1. Land sale agreement dated April 23, 2015 between himself and Douglas Wanafoyo Ogara.
 2. Application for consent of the Land Control Board dated November 11, 2010.
 3. Letter of consent.
 4. Copy of title Deed for the land parcel NO Marachi/Elukongo/3364 dated April 17, 2013 in the name of Douglas Wanafoyo Ogara.
 5. Copy of Title Deed for the land parcel No Marachi/Elukongo/3364 dated May 19, 2015 in the name of Peter Lunani Ongoma.
 6. Green Card for the land parcel NO Marachi/Elukongo/2475.
 13. The 3rd and 4th Defendants filed a joint statement of defence dated April 4, 2022 in which they denied all the allegations of fraud as pleaded by the Plaintiff and put him to strict proof thereof. They added



- that they are innocent purchasers of their respective parcels of land on which they have settled and built their homes.
14. They also recorded their statements and filed a list of their documents all dated April 12, 2022.
 15. In his statement dated April 12, 2022, the 3rd Defendant stated that vide a sale agreement dated September 20, 2013, he purchased the land parcel NO Marachi/Elukongo/3774 from the 1st Defendant at a consideration of Kshs 180,000. That he paid Kshs 170,000 at the time of execution of the agreement leaving a balance of Kshs 10,000. He carried out due diligence before the transaction and confirmed that the 1st Defendant was the registered proprietor of the said land and that it was free of any encumbrances. Then on October 14, 2013, he paid the balance. He was subsequently issued with the title deed to the land parcel NO Marachi/Elukongo/3774 on March 18, 2014 which is clearly surveyed and he and his family have lived thereon without any interruption.
 16. He therefore described the Plaintiff's suit as malicious, frivolous and aimed at embarrassing him. He urged the Court to dismiss it with costs.
 17. The 4th Defendant gave a similar story. In his statement also dated April 12, 2022, he confirmed that vide a sale agreement dated April 15, 2014, he purchased the land parcel NO Marachi/Elukongo/3941 at a consideration of Kshs 190,000 from the 1st Defendant having conducted due diligence and found that the land was registered in the name of the 1st Defendant and that it had no encumbrances. He was issued with the title deed thereto on June 12, 2015.
 18. The land has a clear boundary and none of his neighbours had any objection to the transaction. He has established a home where he lives with his family and also cultivates food crops.
 19. He too described the Plaintiff's suit as malicious, frivolous and aimed at embarrassing him. He urged the Court to dismiss it with costs.
 20. The 3rd and 4th Defendants filed the following documentary evidence vide their list dated April 12, 2022:
 1. Sale agreement dated October 14, 2013.
 2. Sale agreement dated September 20, 2013.
 3. Sale agreement dated April 15, 2014.
 4. Title deed for the land parcel No Marachi/Elukongo/3774.
 5. Title deed for the land parcel No Marachi/Elukongo/3941.
 21. The Plaintiff filed a reply to the 2nd Defendant's statement of defence reiterating the contents of his plaint and joining issue with the said defence.
 22. The plenary hearing commenced before Omollo J on July 21, 2022 when he Plaintiff testified. He was led by his counsel Mr Jumba and he adopted as his testimony the contents of his statements as summarised above. He was then cross-examined both by Mr Omondi counsel for the 2nd Defendant and by Mr Masiga counsel for the 3rd and 4th Defendants. He also produced his lists of documents as his evidence.
 23. The 2nd, 3rd and 4th Defendants testified before me. They were led by their counsel Mr Omondi (for 2nd Defendant) and Mr Masiga (for the 3rd and 4th Defendants) in their evidence in chief. They too adopted as their evidence the contents of their statements and were cross-examined by Mr Jumba. They also produced as their documentary evidence their respective lists of documents mentioned above.



24. Submissions were thereafter filed both by Mr Jumba instructed by the firm of Balongo & Company Advocates for the Plaintiff, Mr Omondi instructed by the firm of Omondi & Company Advocates for the 2nd Defendant and by Mr Wekesa instructed by the firm of Amani Wekesa & Associates Advocates for the 3rd and 4th Defendants.
25. I have considered the evidence by the Plaintiff, the 2nd, 3rd and 4th Defendants as well as the submissions by counsel. The 1st Defendant of cause did not defend this suit and so the Court has not had the benefit of his testimony.
26. Counsel have made robust submissions touching on, inter alia, the lack of capacity by the 1st Defendant to sub-divide the land parcel No Marachi/Elukongo/2475 and sell the resultant sub-divisions to the 2nd, 3rd and 4th Defendants, failure by the Plaintiff to prove fraud and the claim that the 2nd, 3rd and 4th Defendants are infact innocent purchasers for value. I thank them for their industry. They did not however address me on the critical issue as to whether infact the Plaintiff's suit is statute barred. That issue was not even pleaded and the nearest that the 2nd Defendant did was to state in paragraph 4(a) of his defence that the Plaintiff's suit is bad in law. Limitation is an issue of law which this Court can raise suo moto.
27. Having considered the Plaintiff's amended plaint and testimony, I have no doubt that his claim runs foul of the provisions of Section 7 of the *Limitation of Action Act* which provides that:

7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

In paragraph 4 of the amended plaint, he pleaded that:

4: "The Defendant without petitioning the Estate of his late father he on 21st October 2001 caused the said parcel of land to be fraudulently sub-divided into parcels NOS L R Marachi/Elukongo/3363 and 3364 without following due process of succession."

When he was re-examined by his own counsel on July 21, 2022, he said:

"L R 2475 was registered in 1st Defendant's name on 11/10/2001."

And in paragraph 7(aa) of his amended plaint, he seeks the following remedy:

"Revocation of all entries made on Marachi/Elukongo/2475 as from 21/10/2001 onward and all title deeds emanating from the sub-divisions be quashed."

The Green Card to the original land parcel No Marachi/Elukongo/2475 shows that it was transferred from the deceased to the 1st Defendant on October 21, 2001 before being closed on March 14, 2011 upon its sub-division to create the land parcels No Marachi/Elukongo/3363 and 3364. Clearly therefore, and from the Plaintiff's own documentary and oral testimony, he knew about the fraudulent transfers of the land parcel No Marachi/Elukongo/2475 from the deceased's name and into the 1st Defendant's name on October 21, 2001. This suit was first filed on February 21, 2018 some 17 years later. It is obviously statute barred as it ought to have been filed by October 21, 2013. Section 26 of the *Limitation of Action Act* which provides that in an action founded upon fraud of the defendant the period of limitation does not begin to run until the plaintiff has discovered the fraud, does not aid the Plaintiff because by his own admission, he knew about the fraud on October 21, 2001.



28. It is also evident from the Plaintiff's pleadings in paragraph 4A of his amended plaint that the allegations of fraud were only pleaded as against the 1st Defendant. No such allegations were levelled against the 2nd, 3rd and 4th Defendants. Indeed in paragraph 12 of his submissions, counsel for the 2nd Defendant has stated that:

12: "In the amended plaint, the Plaintiff pleaded and particularised fraud (see paragraph 4A). It is not clear to whom those particulars are attributed to. But it is clear they are not attributed to the 2nd Defendant. In any event, the Plaintiff never produced in evidence documents alluded to in sub-paragraphs (ii) and (iii). The particulars were therefore not proved. Least of all there is no any suggestion that the 2nd Defendant was party to any fraud or misrepresentation."

On his part, counsel for the 3rd and 4th Defendants made the following submission on the same issue:

"It is evident from the pleadings and from the evidence adduced in this Court that while the Plaintiff did not apportion any form of fraud against the 3rd and 4th Defendants, he went ahead to make vague and very general allegations of fraud against the Defendants. The onus of prima facie proof is much heavier on the Plaintiff in this case than in any ordinary civil case."

When the Plaintiff was cross-examined by Mr Omondi on July 21, 2022, he said:

"When Peter purchased, 1st Defendant was the owner. Peter was not part of the fraud or illegality committed by 1st Defendant."

With regard to the case as against the 2nd, 3rd and 4th Defendants, it is clear that in addition to being statute barred, no fraud was pleaded against them and neither was evidence led in that respect. The case against them must therefore collapse.

29. As regards the 1st Defendant, he did not defend the claim against him. The allegations of fraud were therefore not rebutted. Indeed even if he had defended this suit, the allegation that he was intermeddling with his late father's Estate would have been difficult to surmount given the veracity of the Plaintiff's oral and documentary evidence. He is clearly a fraudster. No wonder he did not want to show his face in this Court. Now he has left his brother to shoulder a bill of costs out of his (1st Defendant's) greed. That is why at the commencement of this judgment, I emphasised on the need of brotherly love. Hopefully, and notwithstanding the disposal orders which I am about to make in this dispute, the 1st Defendant will find time to apologise to the Plaintiff and start a new chapter in their no doubt strained relationship.

30. Ultimately therefore, this Court makes the following orders in disposal of this suit:

1. The Plaintiff's suit is dismissed for being statute barred.
2. The Plaintiff to meet the costs of the 2nd, 3rd and 4th Defendants.

BOAZ N. OLAO

JUDGE

20TH JULY 2023

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 20TH DAY OF JULY 2023 BY WAY OF ELECTRONIC MAIL. RIGHT OF APPEAL



BOAZ N. OLAO

JUDGE

20TH JULY 2023

